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No. 97-215

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

ARTHUR CALDERON, WARDEN, CALIFORNIA STATE PRISON AT SAN QUENTIN, *Petitioner*,

v.

THOMAS M. THOMPSON, *Respondent*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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ARTHUR CALDERON, WARDEN, CALIFORNIA STATE PRISON AT SAN QUENTIN, *Petitioner*,

v.

THOMAS M. THOMPSON, *Respondent*.

ARGUMENT

SECTION 2244(b), AS AMENDED BY AEDPA, PRECLUDED THE NINTH CIRCUIT'S RECALL OF ITS MANDATE

Thompson asks this Court to ignore the manifest intent of Congress in enacting stringent limitations on successive § 2254 habeas petitions in favor of a general legal standard that does not genuinely constrain or inform the lower courts or litigants in habeas corpus proceedings. Specifically, Thompson unpersuasively relies on the "inherent power" of federal courts of appeals to recall a mandate on "a case by case basis" upon grounds "as varied as the cases that come before the courts" in support of the abuse of the writ that occurred in the eleventh hour in this case. *See* RB at 27. In contrast, the State relies upon the specific statutory command of § 2244(b)(1) which controls relitigation of habeas corpus claims in the federal courts of appeal once a decision in a "first" habeas petition is

final. Rather than being circumvented, "sua sponte" or otherwise, the limitations on successive petitions should be strictly enforced by the federal courts of appeals.

A. In Clearly Specifying Within AEDPA The Narrow Exceptions To Res Judicata In 28 U.S.C. § 2254 Proceedings, Congress Has Left Federal Courts Of Appeals Without Jurisdiction To Recall The Mandate In Such Proceedings.

Thompson acknowledges that Congress intended to extend res judicata to habeas corpus by enactment of § 2244(b). RB at 19, n.14., citing H.R. Rep. No. 470, 103rd Cong. 2d Sess. (1994). He argues, however, that res judicata has never been seen as a limit on a court's power to correct its own judgments. This point ignores the fact that, in addition to including res judicata in federal habeas corpus, Congress has also expressly specified the limited exceptions to the finality of a federal court's determination of the validity of a state inmate's claims in a 28 U.S.C. § 2254 proceeding. *See* 28 U.S.C. § 2244(b). In so doing, Congress foreclosed the recall of a federal circuit court's mandate in habeas corpus proceedings.

Congress has the authority to limit an appellate court's power to recall its mandate. *See R. Simpson & Co. v. Commissioner*, 321 U.S. 225, 228 (1944); *Helvering v. Northern Coal Co.*, 293 U.S. 191, 193 (per curium) (1934).[1] The "usual rules of law applicable in court

1. For example, this Court has recognized Congress's power to limit a court's power to recall its mandate when it declined to rehear proceedings in tax cases based on Congress defining the finality of a tax board decision in order to accurately specify when the statute of limitations would begin to run on assessments and collection suits. Inasmuch as Congress provided that the decision of the tax board would be final "upon the expiration of 30 days from the date of the issuance of the mandate of the Supreme Court" this Court yielded to the "authoritative and explicit requirement" in the statute and denied the government's request for rehearing in the case since this Court's mandate had already issued. *Helvering v. Northern Coal Co.*, 293 U.S. at 193; *see also United States v. Ohio Power Co.*, 353 U.S. 98, 110 (1957) (Harlan, J., dissenting).

procedure," have necessarily been changed by Congress's enactment of AEDPA. *See R. Simpson & Co. v. Commissioner*, 321 U.S. at 228. With enactment of AEDPA, a court of appeals can no longer recall its mandate in a 28 U.S.C. § 2254 proceeding. *Ruiz v. Norris*, 104 F.3d 163, 164-65 (8th Cir. 1997).

B. Congress Clearly Did Not Intend To Allow Circumvention Of AEDPA's Prohibition On Relitigating Determinations Of The Legality Of State Inmates' Judgments Of Conviction By Permitting A Federal Appeals Court To Recall Its Mandate.

Thompson contends that this Court should decline to find that the "inherent power" of the court to recall a mandate was repealed by AEDPA, since repeals by implication are not favored. RB at 19, citing *Felker v. Turpin*, ___ U.S. ___ 116 S. Ct. 2333, 2338 (1996). Thompson's reliance on this maxim of statutory construction is misplaced.

First, in *Felker*, the issue was whether this Court's authority pursuant to 28 U.S.C. § 2241 had been impliedly repealed by enactment of AEDPA. Accordingly, application of the maxim regarding repeal by implication in *Felker* was appropriate since "it can be strongly presumed that Congress will specifically address language on the statute books that it wishes to change." *United States v. Fausto*, 484 U.S. 439, 453 (1988). Here, since neither the Ninth Circuit nor Thompson has identified any

statutory authority for the Ninth Circuit's recall of its mandate in this case, there is no basis for application of the maxim.[2] Congress did not create any statutory right to recall the mandate, so there is no implied repeal problem created when Congress limited that right by enacting AEDPA. *See United States v. Smith*, 499 U.S. 160, 172 (1991).

Further, such maxims are not rules of law, but merely aids to statutory construction, and do not override the clear intent of Congress. *Neuberger v. Commissioner*, 311 U.S. 83, 88 (1940). Since the intent of Congress in AEDPA regarding the finality of habeas corpus applications is manifest, there is no need to resort to maxims of construction in this case. *Amtrak v. National Assn. of Railroad Passengers*, 414 U.S. 453, 458 (1974); *United States v. Barnes*, 222 U.S. 513 (1912).

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2. While the source of a court's "inherent power" to recall its mandate has never been conclusively identified, it has been suggested that its source is Fed R. Civ. P. Rule 60(b). *American Iron and Steel Institute v. E.P.A.*, 560 F.2d 589, 594-95 (3rd Cir. 1977) *cert. denied*, 435 U.S. 914 (1978). Nothing in Rule 60(b) remotely supports the notion that it provides authority for an appellate court recalling its mandate. Moreover, even assuming arguendo that Rule 60(b) is the source of such authority, then it is clear any reliance upon Fed. R. Civ. P. Rule 60(b) in Thompson's case must be consistent with habeas corpus rules and statutes. *See McFarland v. Scott*, 512 U.S. 849, 866 (1994); *Pitchess v. Davis*, 421 U.S. 482, 489 (1975); *see also United States v. Carlisle*, ___ U.S. ___, 116 S. Ct. 1460, 1466 (1996). The "gatekeeper" role of the courts of appeals under AEDPA, cannot be reconciled with a recall of the mandate to relitigate habeas claims.

Amicus Curiae National Association of Criminal Defense Lawyers identifies a source for the power of courts of appeal to recall its mandate as 28 U.S.C. § 2106. Amicus Br. at 5. Even the authority relied upon by amicus curiae for this proposition, however, recognizes that the authority of an appellate court to recall its mandate "is not expressly set forth in statute." *Greater Boston Television Corporation v. F.C.C.*, 463 F.2d 268, 277 (D.C. Cir. 1971), *cert. denied*, 406 U.S. 950 (1972).

Finally, canons of construction should never be employed to "eviscerate manifest legislative intent." *United States v. Cook*, 384 U.S. 257, 262 (1966). Recall of a mandate for purposes of relitigating habeas corpus claims would eviscerate Congress's manifest intent to foreclose delay and piecemeal litigation in federal courts resolving claims in § 2254 cases. The purpose of AEDPA was "to curb the abuse of the statutory writ of habeas corpus, and to address the acute problems of unnecessary delay and abuse in capital cases."[3] U.S. Code Cong. & Admn. News, 104th Cong. 2nd Sess. at 944 (1996) (House Conf. Rep. 104-518, at 111 (1996). The recall of the mandate in Thompson's case was totally contrary to the express intent of Congress in enacting AEDPA.

C. The Ninth Circuit En Banc Majority Could Not Recall Its Mandate Sua Sponte.

Thompson also contends that there was no "end run" on AEDPA in his case since the Ninth Circuit acted sua sponte in recalling its mandate.[4] RB at 20-22.

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3. The amendment to section 2244 was the culmination of a reform effort that began with the Reform the Judiciary Intervention in State Proceedings Act of 1983 and continued for 13 years until AEDPA became law. Accordingly, not only is the intent of Congress in enacting AEDPA manifest, it also represents an extensively debated response to an abiding public outrage over endless delays in habeas corpus litigation.

4. The en banc majority's insistence that it acted sua sponte in recalling its mandate does not preclude a determination by this Court to the contrary, particularly when there are so many factors contradicting the en banc majority's characterization of its actions as sua sponte. First, the en banc majority acknowledges electing to wait to act "until after Thompson .... filed a further request for review in this Court." J.A. 215. Obviously, there would be no need to await further action by Thompson in order to act sua sponte in response to

the "exceptional circumstances" cited by the en banc majority. Indeed, sua sponte action would have allowed the matter to be redressed before the mandate ever issued.

The en banc majority's reliance on the interest of comity as explaining its delay in acting sua sponte until the eleventh hour cannot withstand scrutiny. There were no comity considerations involved in the Ninth Circuit reconsidering Thompson's habeas claims en banc on the same factual and legal basis. Thompson had already exhausted his state remedies on the factual and legal basis of those particular claims. Accordingly, there was no justification for delaying "sua sponte" action in order to permit the State an opportunity to rule on new claims which the en banc majority insists were never a basis for the Ninth Circuit's actions.

Second, there was no indication the Ninth Circuit was acting sua sponte prior to the issuance of the August 3, 1997, en banc majority opinion. The July 30, 1997, Order, which references the en banc vote regarding consideration of a recall of its mandate does not reference that the Order itself was issued sua sponte, or that the vote authorizing the en banc consideration was taken sua sponte, and/or without regard to Thompson's Motion to Recall the Mandate. J.A. 194. Moreover, it is readily apparent from the dissent to the July 30, 1997, Order that the full en banc Ninth Circuit vote was not taken with the understanding that the en banc court was acting sua sponte without reference to Thompson's Motion to Recall the Mandate:

> A majority of the active judges of the court have authorized an en banc court to reconsider an order denying the motion to recall the mandate which issued from this court June 11, 1997.
>
> . . . .
>
> The en banc court has not advised the parties whether the court intends to limit its reconsideration to the petitioner's motion to recall the mandate, whether it intends to reconsider matters which the Supreme Court considered when it denied the petition for certiorari or whether it intends to consider setting aside the penalty of death based on the newly discovered evidence claim.

J.A. 195, emphasis added (Beezer, J., dissenting); *see also* J.A. 275-76.

Additionally, neither Thompson nor his amicus curiae has explained how the failure to conduct an en banc vote when two judges believed en banc review was appropriate could culminate in a

Thompson reasons that the successive petition provisions of AEDPA have no application to his motion because the Ninth Circuit did not act in response to a second application for habeas relief, or any action by him which could be deemed the functional equivalent of a second petition. Thompson's argument ignores the fact that the Ninth Circuit would not have any jurisdiction to act sua sponte, or otherwise, absent his filing his Motion to Recall the Mandate, or pursuing an appeal from the denial of his Fed. R. Civ. P. Rule 60(b) motion.[5]

Thompson argues that the authority for the Ninth Circuit recalling its mandate in his case is the "inherent power" of the courts of appeals. RB at 25. Whether a court's action is appropriately within the scope of its "inherent powers" turns on the source of the court's inherent powers.[6] *In re Tutu Wells Contamination Litigation*, 120 F.3d 368, 383 (3rd Cir. 1997).

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dramatic increase in votes for en banc review absent some intervening information reaching the Ninth Circuit. Clearly, Thompson's motion and its attendant allegations of newly discovered evidence of innocence of rape were the catalyst for the belated increase in interest for en banc review, as well as the actual basis for the Ninth Circuit's en banc proceedings.

5. While Thompson filed an appeal from the denial of his Fed. R. Civ. P. Rule 60(b) motion subsequent to filing his Motion to Recall the Mandate, and prior to the en banc majority's recall of the mandate, the Ninth Circuit's jurisdiction over that appeal was clearly not the basis for its action as evidenced by the footnote in its decision deeming the appeal moot. *See* J.A. 212, n.1.; *see also Amicus Curiae*, National Association of Criminal Defense Lawyers Brief at 15, n.8 (appeal from 60(b) dismissed in separate order, "only proceeding pending before en banc court was rehearing of original appeal.")

6. Post-mandate motions are not referenced in any of the Federal Rules of Appellate Procedure. The Advisory Committee Note to Fed. R. App. P. Rule 37 references the possibility of a motion to recall the mandate in its last sentence. Fed. R. App. P. Rule 37, however, relates to interest on judgments for money in civil cases.

Thompson relies on the "inherent power of Anglo-American courts" to recall their mandates or otherwise reopen judgments to correct manifest errors based on firmly established rule of equity. RB at 18., n.12. Thompson's invocation of equity does not afford any basis for ignoring the body of statutes, rules and precedents that govern abuse of the writ. *Lonchar v. Thomas*, 517 U.S. 314, 116 S.Ct. 1293, 1298 (1996). Inherent power does not permit a court to circumvent or conflict with applicable laws. *See Carlisle v. United States*, 116 S. Ct. at 1466.

Since Thompson's § 2254 case was before the Ninth Circuit pursuant to an appeal by both parties, its jurisdiction in the case was appellate jurisdiction pursuant to 28 U.S.C. § 1291. The notion that a court of appeals can re-establish its jurisdiction by recalling its mandate, either on motion, or sua sponte, ignores the fact that "'the issuance of the mandate formally marks the end of appellate jurisdiction.'" *Boston & Maine Corporation v. Town of Hampton*, 7 F.3d 281, 282 (1st Cir. 1993), quoting *Johnson v. Bechtel Associates Professional Corp.*, 801 F.2d 412, 415 (D.C. Cir. 1986). Accordingly, in order to recall the mandate, the court of appeals must have a basis for acting when it no longer has appellate jurisdiction. *See Iverson v. Commissioner of Internal Revenue*, 257 F.2d 408, 409 (3rd Cir. 1958); *see also Boston & Maine Corporation*, 7 F.3d at 282 (recall of mandate by court of appeals would vest an exceptional power in those courts of essentially original jurisdiction as opposed to appellate jurisdiction).

Moreover, the inherent powers of federal courts are those that "are necessary to the exercise of all others." *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980). Federal courts are not courts of general jurisdiction for "they have only power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto." *Bender v. Williamsport Area School*

Dist., 475 U.S. 534, 541 (1986). A federal court does not have "inherent authority" to define or expand its own jurisdiction. *See U.S. v. McGlocklin*, 8 F.3d 1037, 1051-52 (6th Cir. 1993), *cert. denied*, 511 U.S. 1054 (1994) (Ryan, J., dissenting).

Thompson's reliance on the "sua sponte" nature of the en banc majority's actions simply ignores the fact that the courts of appeals cannot exercise any jurisdiction over habeas corpus proceedings beyond that granted by Congress. *Felker v. Turpin*, 116 S. Ct. at 2238, 2240; *Kuhlmann v. Wilson*, 477 U.S. 436, 454 (1986). After enactment of AEDPA, the Ninth Circuit no longer has jurisdiction to even entertain an application for habeas corpus. *Felker v. Turpin*, 116 S. Ct. at 2338; Fed. R. App. P. Rule 22a. Accordingly, consistent with the State's request in its opposition to Thompson's Motion to Recall the Mandate, the Ninth Circuit was compelled to deem Thompson's motion a request for leave to file a second or successive habeas petition in the district court, and perform the role of the "gatekeeper" as set forth in AEDPA, or dismiss the motion for lack of jurisdiction.[7] Instead of playing the limited role in habeas corpus proceedings delineated by Congress, here the Ninth Circuit's en banc majority, "like the proverbial camel, have not only stuck their noses under the district court's tent, but they are fully ranging around in turf that properly belongs to the district courts." *Washington v. Philadelphia Cty. Ct. of Common Pleas*, 89 F.3d 1031, 1048 (3rd Cir. 1996).

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7. Neither Thompson nor amicus curiae in support of Thompson has suggested that Thompson could meet the requirements for being heard in a successive petition in the district court, which explains why both Thompson and the en banc majority persist in characterizing the eleventh-hour actions of the Ninth Circuit as sua sponte and involving his "first" federal petition.

D. AEDPA Clearly Applied To Thompson's Eleventh-Hour Efforts To Obtain Federal Habeas Relief.

Thompson argues that the successive petition limitations in § 2244(b), as amended by AEDPA, have no application in his case since (1) his habeas petition was filed in 1990, prior to enactment of AEDPA and (2) his case involves the appeal from the district court's judgment in his "first" habeas corpus proceeding (RB at 17-18). Thompson's argument ignores this Court's application of AEDPA to a state inmate's subsequent application for habeas corpus relief, even though the inmate's "first" federal habeas petition was filed prior to the enactment of AEDPA. *Felker v. Turpin*, 116 S. Ct. at 2336-37. Any other interpretation of AEDPA is totally contrary to the manifest intent of Congress to fully reform federal habeas corpus legislation by ending the expansive practice of endless litigation that had developed over the years. *See* H.R. Comm. Rep. No. 681 at 25, n.102 (1990). AEDPA clearly applies to the recall of the mandate in Thompson's case since his Motion to Recall the Mandate was filed about 15 months after the passage of AEDPA. *Ruiz v. Morris*, 104 F.3d at 163 (applying AEDPA to motion to recall mandate filed 8 months after AEDPA became law).

Thompson also asserts that AEDPA does not apply here because his case involves the appeal from the district court's judgment in his "first" habeas corpus proceeding. RB at 18, n.10. This point unpersuasively places the cart before the horse. It is only by ignoring the applicable requirements of AEDPA in recalling its mandate that the Ninth Circuit was able to characterize the relitigation of Thompson's claims as involving the appeal from Thompson's "first" habeas petition.

E. The Preclusive Effect Of AEDPA Is Not Unduly Harsh.

Amicus curiae National Association of Criminal Defense Attorneys observes that the recall of the mandate

> was merely a resumption of the original hierarchical review that was short-circuited by the administrative error of the court itself during Thompson's original passage through the court of the appeals earlier in the year.

Amicus Br. at 17, emphasis added. Congress has expressly indicated that after Thompson's "original passage" through the federal courts, he must satisfy stringent requirements to be heard again. When the nature of § 2254 proceedings is considered, there is nothing unduly harsh flowing from the successive petition requirements in AEDPA.[8]

Thompson and *Amicus Curiae* both rely on this Court's decision in *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944). RB at 19, 24, 26, 30; Amicus Br. at 7. This Court departed from its own rule in *Hazel-Atlas* after concluding it would be "manifestly unconscionable" to rigidly adhere to the applicable rule. Apart from the difference between AEDPA and this Court's rules, there is also the reality that there is absolutely nothing "manifestly unconscionable" in leaving Thompson to his available remedies.

While Thompson observes that the mandate in his case "was recalled a scant 53 days after its issuance" RB at 26, n. 18, he conveniently ignores the fact that when

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8. Repetitive litigation of a state inmate's habeas claims is completely distinct from situations where a litigant has been denied access to the federal courts. Cf., *Bryant v. Ford Motor Co.*, 886 F.2d 1526 (9th Cir. 1989), *cert. denied*, 493 U.S. 1076 (1990); *Patterson v. Crabb*, 904 F.2d 1179, 1180 (7th Cir. 1990.)

the en banc majority recalled its mandate about 36 hours before Thompson's August 5, 1997, scheduled execution, it had been almost nine years since his conviction for the rape and murder of Ginger Fleischli became final.[9] *Thompson v. California*, 488 U.S. 960 (1988) (Petition for Certiorari denied November 14, 1988); *Griffith v. Kentucky*, 479 U.S. 314, 321, n.6. (1987) (decision final following denial of Petition for Certiorari). Unlike ordinary civil cases, Thompson's litigation did not begin in the federal district court in 1989. In fact, his entire "first" petition was in reality a "second bite at the apple." Accordingly, the constraints imposed by AEDPA upon a "third bite at the apple" in § 2254 proceedings are inherently reasonable in the abstract and as applied here.[10]

Amicus Curiae cites to this Court's decision in *Gondeck v. Pan American World Airways, Inc.*, 382 U.S. 25, 26-27 (1965), which concluded that the "interests of justice

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9. Thompson's focus on the 53 days between the spreading of the mandate in the district court and the eleventh-hour recall of the mandate on August 3, 1997, also ignores the intervening five months that elapsed since the situation regarding the two judges desire for an en banc vote was known to the full court in March of 1997. *See* J.A. 241, 259, n.3.

10. Actually, the en banc consideration of Thompson's appeal following recall of the mandate could also be considered his "16th bite of the apple" since in the past 16 years he has been heard by no less than his jury; by the state trial court in his motion for new trial and his motion to modify his death verdict; by the California Supreme Court in his direct appeal, and in his first, second, third and fourth state habeas petitions; by Judge Gadbois in the district court following multiple amendments to his petition over a number of years, and in a motion to alter the judgment; by the three-judge panel on appeal, by Judge Tevrizian in the district court by way of his eleventh hour Fed. R. Civ. P. Rule 60(b) motion, by the three-judge panel in his eleventh-hour motion to recall the mandate, and by this Court in twice denying certiorari.

make unfair strict application of our own rules." Amicus Br. at 7-8. Thompson can hardly equate himself with the surviving widow seeking her late husband's death benefits in *Gondeck*. Moreover, as this Court has recently reaffirmed, pronouncements regarding the use of rules of procedure have "no effect outside the context of ordinary civil litigation where the propriety of continuing prospective relief is at issue" such as § 2254 proceedings. *Agostini v. Felton*, ___ U.S. ___, 117 S. Ct. 1997, 2018 (1997) citing *Teague v. Lane*, 489 U.S. 288 (1989).

Thompson is a convicted rapist/murderer sentenced to death who steadfastedly refused to pursue successive habeas relief in the manner required by AEDPA. The en banc majority's mere disagreement with the three-judge panel's application of well established law to the facts of this case does not provide any justification in law or equity for the reversal of a capital case in the eleventh hour after 16 years of litigation in state and federal courts.

CONCLUSION

For the forgoing reasons, the judgment of the en banc judgment of the Ninth Circuit Court of Appeals should be reversed in its entirety.

Dated: November 13, 1997.

Respectfully submitted,

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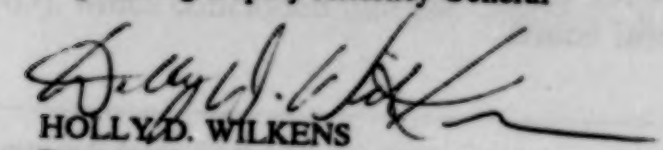

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